

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS
CIVIL DEPARTMENT

PETER J. KONEK, individually
and on behalf of all others
similarly situated,

Plaintiffs,

vs.

No. 6:08-CV-1145-MLB-KMH

ACTAVIS, INC., et al.;

Defendants.

DEPOSITION OF [REDACTED] TAKEN ON BEHALF OF
DEFENDANTS.

JULY 27, 2009

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EXHIBITS

EXHIBIT NO.

DESCRIPTION

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A - Plaintiff Fact Sheet

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B - Class action complaint

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C - Pharmacy records

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D - Humana records

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E - Amended Notice of deposition

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ACTAVIS, INC., et al.
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DEPOSITION OF [REDACTED]
produced, sworn and examined on JULY 27, 2009,
between the hours of eight o'clock in the
forenoon and six o'clock in the afternoon of
that day, at the offices of Hutton & Hutton,
8100 East 22nd Street North, Building 1200,
Wichita, Kansas 67226 before Kristi A. Bissell,
a Certified Shorthand Reporter, Certified Court
Reporter within and for the States of Kansas and
Missouri, in a certain cause now pending in the
United States District Court, District of
Kansas, in re: Konek v. Actavis, et al.

APPEARANCES

For the Plaintiffs:

Ms. Deborah B. McIlhenny
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Building 1200
Wichita, Kansas 67226-2312

For the Defendant/Mylan:

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Reported By:

Kristi A. Bissell, CSR (KS), CCR (MO)
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1 Digitek off the market. Now, they gave some
2 reasons, but there was nothing that, you know, a
3 person could do unless they had a complete
4 physical a couple weeks or three weeks before
5 that until after that, so -- where are we?

6 So after I got the word on that, the
7 first thing I did is I called my doctor and his
8 nurse answered like she normally does. I gave
9 her the information. She told me that she would
10 have another prescription for me within either
11 that evening or the next day. So I got my other
12 prescription. I was sitting around the house,
13 just, you know -- I read this thing two or three
14 times and it kind of made me hot that they would
15 have something like that on the market.

16 How something could get away like that.
17 It had a few things in there that possibly could
18 result like in any medicine you take. There is
19 always some things that help you and there is
20 always some things that might not and I just
21 decided I was going to do something about it.
22 So I contacted a friend of mine and he turned me
23 over to Deb, and that's it. We got to work.

24 Q. You mentioned that like any medicine
25 some things can help you and some things cannot?

1 misdosed?

2 A. It wouldn't be on the market.

3 Q. Do you believe there were ever misdosed
4 pills or tablets on the market; Digitek pills?

5 A. I have no idea. I know that they took
6 them off. There had to have been a reason and
7 the reason that I read was that it would have
8 been an overdose. That's not good.

9 Q. And your understanding of the reason
10 they came off the market was that all pills or
11 some pills were inaccurately-dosed?

12 A. That, I don't know.

13 Q. Do you agree you need to look at the
14 specific pills to find out whether it was a
15 correct dose or not a correct dose?

16 A. That would be the only way I know.

17 Q. If you turn to paragraph 88 it says,
18 "Defendants' misleading and exploitive conduct
19 put Plaintiff and the proposed nationwide Class
20 members at risk for greater physical harm and
21 denied them the material facts as to the unsafe,
22 life-threatening characteristics of defective
23 Digitek in contrast to the medically-beneficial
24 Digitek with FDA-approved appropriate doses."
25 Are you asserting claims of anxiety by taking

1 inappropriately-dosed Digitek?

2 A. I need help. I'm confused.

3 Q. Sure. How can I help?

4 A. Not you. Her (indicating).

5 MS. MCILHENNY: [REDACTED] I
6 can't help you with the questions and answers.

7 THE WITNESS: You told me that
8 before, haven't you, and I keep trying, don't I?

9 MS. MCILHENNY: Yes, you do.

10 THE WITNESS: And I will keep
11 trying.

12 A. I don't understand what you're asking
13 me to tell you the honest truth.

14 Q. (By Ms. Smith) Let's step away from
15 this allegation and not worry about how it's
16 worded here and let me ask you, do you believe
17 that because you alleged some Digitek may have
18 been on the market that was misdosed, that
19 people became anxious about the Digitek they
20 took?

21 A. Possibly, yes.

22 Q. Did you personally experience any
23 anxiety based on the Digitek you took?

24 A. No.

25 Q. And in your lawsuit to the extent some

1 people did experience anxiety, are you seeking
2 to recover in this lawsuit for their anxiety for
3 them?

4 A. True.

5 Q. In your Plaintiff Fact Sheet, which
6 we've marked as Exhibit A, you stated that you
7 are not seeking to recover any sort of lost
8 wages?

9 A. Right.

10 Q. That means --

11 A. Would be pretty hard to do.

12 Q. Well, that will definitely probably cut
13 short my questions.

14 A. Since I've been retired for about 25
15 years. It's going to be difficulty.

16 Q. That was going to be my next question.
17 What was your last job and what did you do
18 there?

19 A. I was a real estate broker and how long
20 ago has it been since I retired? I can't
21 remember.

22 Q. Do you understand that some people who
23 took Digitek may allege that as a result of
24 taking Digitek, they had to miss work and
25 therefore have lost wage claims?

1 A. Right. I think so.

2 Q. And in your lawsuit are you seeking on
3 their behalf to recover those claims?

4 A. For them?

5 Q. For them.

6 A. And me, no.

7 Q. For you you've already answered, I
8 believe, which is you don't currently work, so
9 for them?

10 THE WITNESS: I've got a question
11 for you John, I tell you.

12 MS. MCILHENNY: Let's save your
13 questions for later.

14 THE WITNESS: Okay.

15 Q. (By Ms. Smith) Are you seeking in your
16 lawsuit to recover lost wages on behalf of the
17 people in your proposed Class?

18 A. No.

19 Q. Do you agree that to the extent
20 somebody in your proposed Class experienced any
21 sort of medical injuries, that I would need to
22 talk to them to understand the specifics of
23 their injuries?

24 A. Say again. I think I know what you
25 mean.

1 Q. And in between the only other thing you
2 go to a doctor for would be a specific event
3 that would lead you to call him?

4 A. True.

5 Q. To your knowledge, did you ever have a
6 physical reaction to Digitek?

7 A. No.

8 Q. Do you believe your doctors would have
9 caught it if you had?

10 A. They probably would.

11 Q. As far as you're concerned with respect
12 to the Digitek that you took, did it do its job
13 in helping your heart stay in rhythm?

14 A. I would say that it did. Unless I took
15 one when they put the wrong one in the package.

16 Q. Well, do you have any specific
17 recollection of taking --

18 A. No, I don't.

19 Q. And do you have any recollection of
20 having any adverse physical --

21 A. Huh-uh.

22 Q. -- effect?

23 MS. MCILHENNY: Please let her
24 finish her questions before you answer.

25 Q. (By Ms. Smith) Do you have any

1 specific recollection of an instance where you
2 thought you were experiencing physical symptoms
3 because of the Digitek you took?

4 A. No.

5 Q. Do you recall that Digitek, when
6 properly administered, serves an important
7 function in keeping your heart working properly?

8 A. Yes.

9 Q. Do you believe that you received that
10 benefit from taking Digitek?

11 A. Yes.

12 Q. So the pills that you took between
13 December, 2007, and May of 2008, or it may have
14 been late April, 2008, to the best of your
15 knowledge, those pills functioned properly for
16 you?

17 A. Yeah.

18 Q. And you didn't suffer any toxicity as a
19 result of taking those pills?

20 A. No.

21 Q. And based on a physical inspection of
22 the Digitek that you took as you were taking it,
23 did you ever notice any pills that were
24 noticeably different than other Digitek pills
25 that you had taken?

1 A. Couldn't tell you.

2 Q. Are you someone who pays close
3 attention to the pills as you take them?

4 A. No.

5 Q. Fair to say, then, that you never
6 weighed them?

7 A. No.

8 Q. In terms of papers that you might have
9 in possession we talked about the fact that
10 there were going to be some supplemented medical
11 records and entries from your wife's medical
12 journal about your health. Do you cut out
13 newspaper articles or magazine articles on a
14 routine basis on any topic?

15 A. No.

16 Q. So not about Digitek or this
17 litigation?

18 A. No.

19 Q. And apart from your wife's journal, are
20 there any other sort of journals, diaries,
21 calendars that might affect your treatment with
22 Digitek?

23 A. No.

24 Q. I think now is probably a good time to
25 a short break if that's all right with you.

1 Q. Did you take it with a meal?

2 A. No.

3 Q. And I believe I asked this earlier and
4 forgive me if I did, but do you have any
5 recollection of ever forgetting to take a dose?

6 A. No, but if I had I would just skip it.

7 Q. That was my next question. Thank you.

8 Was there ever a time that you recall
9 accidentally taking or for any reason taking two
10 tablets in one day?

11 A. No.

12 Q. And are there any tablets other than
13 the 17 that are in your counsel's possession
14 that you have left over from Digitek?

15 A. No.

16 Q. And we've already talked about the fact
17 that you received a couple letters about the
18 recall of Digitek, correct?

19 A. Correct.

20 Q. Did you return or attempt to return
21 those remaining pills to anybody?

22 A. No.

23 Q. Were you aware through the recall
24 letters that you could have sent them to
25 Stericycle? You may refer to the documents.

1 A. I didn't call them.

2 Q. And you didn't -- the letter states
3 that -- well, let me just read it into the
4 record. It states in bold in the second to last
5 paragraph or third to last paragraph, "If you're
6 currently taking Digitek 0.125 milligrams or
7 0.25 milligram tablets or have a supply on hand
8 you should contact Stericycle customer service
9 at 1-800-276-7177. Representatives will be
10 available Monday through Friday 8 a.m. to 5 p.m.
11 Eastern Standard time. Additional information
12 about the voluntarily recall can be found at
13 www.actavis.us." Did I read that correctly?

14 A. Uh-huh.

15 Q. And you did not contact Stericycle?

16 A. No.

17 Q. Any reason why you didn't?

18 A. No reason.

19 Q. And did you visit www.actavis.us?

20 A. No.

21 Q. Any reason?

22 A. No reason.

23 Q. Were you aware that you could have
24 received a refund through this recall program?

25 A. Yes.

1 Q. Any reason why you didn't seek that
2 refund?

3 A. That's what kind of pissed me off.
4 They want to make me a refund on this thing and
5 I just didn't like that. You know, tell me to
6 go down where you get your things and we'll just
7 give you a few bucks back. No. Huh-uh. No
8 thanks.

9 Q. What is your understanding of that
10 you're suing for in this suit beyond your few
11 bucks?

12 A. I just want this company to get
13 punished. I don't care. They shouldn't be
14 doing what they did. They put a prescription on
15 the market -- just a second, I've got that
16 thing. They put a prescription on the market
17 that had no business being there.

18 Q. Is it your understanding that this
19 company, this laboratory is still operating
20 today?

21 A. I guess they are. I don't know. I
22 have no idea.

23 Q. Is it your understanding that the only
24 consequence of this -- the improper tablet
25 thickness issue is that they gave back money for

1 unused pills and there is nothing else?

2 A. There was a little deal in here a
3 minute ago that you read. I've got to find it.
4 That would save a lot of problems here. I had
5 my finger on it and you kept talking and I took
6 it off. Here it is. Think about this. You
7 read this to me a minute ago. "Overdose,
8 poisoning may occur in children who accidentally
9 swallow this medicine who receive too much
10 medication. If overdosed contact" -- I mean,
11 you know, if you can have an overdose of this,
12 my goodness gracious. That's what would happen
13 if I took one of their pills.

14 Q. And you took their pills, correct?

15 A. Well, I don't know whether I took one
16 that they took off the shelf. I have no idea.
17 You tell me.

18 Q. Did you experience physical symptoms
19 that made you feel like you had an overdose?

20 A. No. I'm just explaining to you that if
21 in fact, I took one, what would happen, if I
22 took an overdose of that. You just read a piece
23 to me a little a while ago stating that the
24 overdose could do this and it could do that.
25 Well, what would this be if I took a pill almost

1 injuries but they are going to not be allowed to
2 recover damages for those because you've limited
3 your request for economic damages? Would that
4 bother you to make that decision on behalf of
5 other people?

6 A. I don't think I can answer that.

7 Q. What do you hope to achieve for the
8 proposed Class?

9 A. Well, they'll probably want some sort
10 of a reward for going through this.

11 Q. Who is "they"?

12 A. The Class.

13 Q. Okay.

14 A. Will probably be looking for some sort
15 of reward depending on what I can do and what I
16 can't do. I feel as though I've got to help
17 them and I'm going to do the best I can for
18 them.

19 Q. And tell me everything that you hope to
20 personally recover in your lawsuit.

21 A. I've told you once and I'm telling you
22 again. I don't care. I just want to see this
23 company punished for doing what they did and
24 they deserve it.

25 Q. Have you investigated to see what

1 as a whole?

2 A. I think so.

3 Q. Do you have any understanding of how
4 you achieve your duty to the Class?

5 A. No, I don't.

6 Q. Do you think that by hiring counsel you
7 do a duty to the Class?

8 MS. SMITH: Objection. Form.

9 Q. (By Ms. McIlhenny) Do you think that
10 it is your duty if you plan to do something on
11 behalf of an entire group of people who are in a
12 similar situation as you and you wish to bring
13 in the form of a lawsuit, that you have the duty
14 to hire counsel to help you with that job?

15 MS. SMITH: Objection. Leading.
16 You can answer after the objection.

17 A. Yeah, I think. Better read it again
18 because. . .

19 MS. MCILHENNY: Can you read that
20 back.

21 (Whereupon, the requested portion
22 of the record was read by the reporter.)

23 MS. SMITH: Objection.
24 Argumentative, too. Go ahead.

25 A. I feel like I should hire counsel.

1 CERTIFICATE

2 I, Kristi A. Bissell, CSR, CCR, a
3 Certified Shorthand Reporter of the State of
4 Kansas, do hereby certify that the witness whose
5 testimony appears in the foregoing deposition
6 was duly sworn by me; that the testimony of said
7 witness was taken by me to the best of my
8 ability and thereafter reduced to typewriting
9 under my direction; that I am neither counsel
10 for, related to, nor employed by any of the
11 parties to the action in which this deposition
12 was taken, and further that I am not a relative
13 or employee of any attorney or counsel employed
14 by the parties thereto, nor financially or
15 otherwise interested in the outcome of the
16 action.

17
18
19 Kristi A. Bissell, CSR, CCR
20 Certified Court Reporter
21 For the State of Kansas
22
23
24
25

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July 28, 2009

Hutton & Hutton
Attn: Debs McIlhenny
8100 East 22nd Street North
Building 1200
Wichita, Kansas 67226-2312

RE: Konek v. Actavis, et al.

Dear Ms. McIlhenny:

Please find enclosed your copy of the deposition of [REDACTED] taken on July 27, 2009, given in the above-referenced case. Also enclosed is the original signature page and errata sheets.

Please have the witness read your copy of the transcript, indicate any changes and/or corrections desired on the errata sheets, and sign the signature page before a notary public. Please return the errata sheets and notarized signature page to Ms. Holly Pauling Smith for filling prior to trial date.

Thank you for your attention to this matter.

Sincerely,

Kristi A. Bissell, CSR, CCR
Enclosures
cc: Ms. Holly Pauling Smith
Mr. John Doheny

STATE OF)
COUNTY OF)

I, [REDACTED] do hereby certify:

That I have read the foregoing deposition;
That I have made such changes in form and/or
substance to the within deposition as might be
necessary to render the same true and correct;
That having made such changes thereon, I
hereby subscribe my name to the deposition.

I declare under penalty of perjury that the
foregoing is true and correct.

[REDACTED]
Executed this ____ day of _____,
2009, at _____.

Notary Public: _____

My Commission Expires: _____

Signature page to:

Ms. Debs McIlhenny
Hutton & Hutton
8100 East 22nd Street North
Building 1200
Wichita, Kansas 67226-2312

[REDACTED] JULY 27, 2009

PETER KONEK v. ACTAVIS, et al.

ERRATA SHEET

RE: PETER KONEK v. ACTAVIS, et al.

DEPOSITION OF: [REDACTED]

PG/LN NO. CORRECTION REASON FOR CHANGE

: _____ : _____ : _____

: _____ : _____ : _____

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: _____ : _____ : _____

_____ I certify that I have read my deposition
in the above case and I request that no changes
be made.

_____ I certify that I have read my deposition
in the above case and I request that the above
changes be made.

SIGNATURE OF DEPONENT:

DATED: _____